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Supreme Court of the United States

October Term, 1942.

GULF REFINING COMPANY,
Appellant Below

Petitioner,

vs.

LOUIS FETSCHAN and CROSS PARK REALTY COMPANY,
Appellees Below

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT, AND BRIEF IN SUP-
PORT THEREOF.**

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To the Honorable Chief Justice
and Associate Justices of the
Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Sixth Circuit entered on June 2, 1942 affirming the judgment of the District Court of the United States for the Southern District of Ohio, Western Division, entered on November 22, 1940.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals filed on June 2, 1942 affirming the judgment of the District Court and the

opinion of the Circuit Court of Appeals filed on August 28, 1942 denying the petitioner's application for rehearing are not yet reported, and are printed as an appendix to this petition and brief.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the judicial code as amended by the Act of February 13, 1925, 43 Stat. 938.

The opinion of the Circuit Court of Appeals on rehearing was filed August 28, 1942, and before the expiration of the three months period thereafter an extension of time for filing this petition was granted and the time extended until January 27, 1943.

SUMMARY STATEMENT.

The plaintiff's action is based upon a claimed violation by Gulf Refining Company, the petitioner, of a lease in which the plaintiff is the lessee and the petitioner the lessor. The lease covers a parcel of several acres of land located in the toe of a horseshoe bend on the Great Miami River, a few miles north of where it empties into the Ohio River, a short distance from Cincinnati, Ohio. The property covered by the lease was formerly owned by Paul and Alice Roessler, who, as lessors, executed a twenty year lease to Louis Fetschan in October, 1925. The complete lease is found in the printed Record, Volume 3, Page 1 et seq. Subsequently, Gulf Refining Company purchased all of the property in the horseshoe bend, including the acreage under lease to Fetschan, which was purchased subject to Fetschan's lease.

Along the river frontage at the toe of the horseshoe Fetschan built a summer camp of twenty-two cottages.

III.

Across the heel of the horseshoe Gulf Refining Company erected an oil refinery and a number of storage tanks. Fetschan's action claims that fumes and odors emitted from the operation of the refinery caused him to lose the rentals from his summer cottages.

In January, 1937, the great flood of the Ohio and Great Miami River occurred and fifteen of Fetschan's cottages were washed away, and in his action he claims that the volume of the flood waters which overflowed his leasehold property was increased by reason of the fact that Gulf Refining Company had built levees around its tanks and that because the elevation of the land had been increased by these levees, that a greater volume and current was thrown over the land in the toe of the horseshoe where Fetschan's cottages were located.

The lease under which Fetschan held the land in the toe of the horseshoe bend, and which lease was assumed by Gulf Refining Company when it purchased the property, provided that the lessee

"Shall lawfully, peaceably and quietly hold, occupy and enjoy said premises during said term, without any let, hinderance, ejection or molestation by said lessors, or their heirs, or any person or persons lawfully claiming under them." (Printed Record Volume 3, Page 4)

In Fetschan's action he claimed that Gulf Refining Company violated this provision of the lease in two respects: first, that the operation of the refinery caused him damages in the loss of rentals from his cottages from January, 1934, to August, 1938; and, second, that by the building of the levees around the tanks Gulf Refining Company caused him to lose fifteen of his cottages in the flood of January, 1937. For the fumes damage he asked \$8000.00; for the flood damage for the loss of his cottages he asked for \$12,400.00.

IV.

Upon the trial the jury returned a general verdict in Fetschan's favor for \$7,908.00. (Record, Volume 1, Page 35).

Cross Park Realty Company was made a party because in 1931 Fetschan had assigned his lease as collateral security guaranteeing the performance on Fetschan's part of a contract between him and Cross Park Realty Company, but neither that contract nor the assignment of the lease have any bearing upon the matters involved in this petition.

When the case was being submitted to the jury, the defendant Gulf Refining Company, petitioner herein, sought to have the jury determine specific questions of fact by means of special interrogatories, first, as to whether or not there had been any breach of the lease by Gulf Refining Company on account of the fumes or on account of the flood, and, second, if the jury found there had been a breach of the lease, then to have the jury find, (a) how much damage there was from the fumes, that is, how much Fetschan had lost from rentals of his cottages, and (b) how much damage Fetschan had suffered from the loss of the cottages by the flood.

These interrogatories will be found as Exhibit G, Page 35, and Exhibits K and L, Page 36 of the Record, Volume 1.

The jury answered interrogatory G, which was as follows:

"Did the defendant, The Gulf Refining Company, as landlord, give to the plaintiff, quiet and peaceful enjoyment of his premises from January, 1934 to August, 1938, without hindrance or molestation as those terms have been defined to you?

Answer: No.

Maurice Robison, Foreman."

The jury did not answer interrogatory K, which was as follows:

"In the event that you find that plaintiff has been damaged by the emission of smoke, or odors, or gases, or smudge, or noises from the refinery of defendant, the Gulf Refining Company, and that the Gulf Refining Company is liable in damages to plaintiff therefor, state the amount of such damage.

Answer:"

The jury did not answer interrogatory L, which was as follows:

"In the event you find that defendant, the Gulf Refining Company, is liable to plaintiff for the value of those of his cottages which were destroyed by the 1937 flood, state the reasonable value of those cottages immediately prior to that flood.

Answer"

(Under the law of Ohio the determination of the amount of damage is by fixing the reasonable value of the property immediately prior to the occasion which caused the loss.)

There were only two elements of damage in Fetschan's action: One for the loss of rentals because of the fumes etc. from the refinery, which we will refer to for brevity as the "fumes damage" and, second, the loss of the fifteen cottages, which we will refer to as the "flood damage."

The jury could not agree upon the amount of the fumes damage.

The jury could not agree upon the amount of the flood damage.

The trial court received the general verdict and entered a judgment thereon against Gulf Refining Company, and your petitioner claims that the receiving of the general verdict and entering judgment thereon was not only erroneous, but constituted a denial of the right of trial by jury as pro-

VI.

vided by the Seventh Amendment of the Constitution of the United States.

Upon appeal the Circuit Court of Appeals affirmed the judgment and erroneously, as we claim, sanctioned the procedure of the trial court upon the incorrect assumption that the general verdict covered only the element of fumes damage and did not contain any award to Fetschan for the flood damage. The Record shows, as our brief will fully detail, that both elements of damage were submitted to the jury and that the general verdict found for the plaintiff upon *all* the issues submitted.

QUESTIONS PRESENTED

The questions presented by this petition are :

First: Whether a judgment may be entered upon a general verdict when the jury has failed to answer an interrogatory submitted by the court, the answer to which interrogatory would establish a fact which is essential to a valid verdict.

Second: Where the jury disagrees as to a fact, the establishment of which is necessary before there can be a general verdict, does such disagreement of the jury have the legal effect of being a finding against the party upon whom the law places the burden of proof as to such fact.

Third: Has the petitioner been denied the right of trial by jury, as guaranteed by the seventh amendment to the Constitution.

REASONS RELIED UPON

The decision of the Circuit Court of Appeals, by affirming the judgment of the District Court, has sanctioned a procedure which so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

VII.

Also, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The question presented upon this petition is one of genuine, intrinsic public significance.

These reasons will be discussed fully in the accompanying brief.

WHEREFORE, your petitioner respectfully prays that this petition be granted and a writ of certiorari issued to the Circuit Court of Appeals of the Sixth Circuit.

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BRIEF

The solution of the problem presented in the petition for writ of certiorari turns upon the legal effect to be given to the failure of the jury to answer an interrogatory upon an issue of fact, the decision of which is necessary to a verdict.

If the jury fails to answer an interrogatory, does that mean that the jury has disagreed as to the fact embraced in the interrogatory? Or does it mean that it is equivalent to a finding as to such fact against the party upon whom the law places the burden of proof of establishing such fact? Since this problem pertains to a matter of procedure, it is governed by the rule or law of the federal courts and not by the rule or law of the state court,

Sibbach v. Wilson, 312 U.S. 1

What, then, is the federal rule as to the effect of the failure of a jury to answer an interrogatory? So far as we have been able to find, there is no adjudication in the federal courts upon this question.

There has been adjudication in the federal court, however, where the jury has failed in a special verdict to make a finding of fact, which fact was essential to a judgment, and the federal rule seems to be that where the jury fails in a special verdict to find an essential fact, it is equivalent to a finding on such fact against the party upon whom the law places the burden of proof.

Daube v. Philadelphia & R. Coal & Iron Co., 77 Fed. 713 (C.C.A. 7th).

By analogy there would seem to be no difference in principle between the failure of a jury to find an essential fact in a special verdict and the failure of the jury to find an essential fact by failing to answer an interrogatory which accompanies a general verdict.

In this case the law placed upon the plaintiff the burden of establishing by the preponderance of the evidence that he had suffered damage in either one or the other or both of the respects claimed in his cause of action before he would be entitled to a judgment, that is, the plaintiff had the burden of proving that he either suffered fumes damage or flood damage. If the plaintiff failed to sustain that burden, the defendant would be entitled to a judgment.

The inquiry as to whether or not the plaintiff has sustained that burden of proof can be determined specifically in one of two ways, either by having a jury to find a special verdict in which the jury would have to find specifically that the plaintiff had sustained such damage, or by a general verdict with an accompanying interrogatory which asked the jury directly and specifically if the plaintiff had sustained such damage.

If the inquiry took the form of a special verdict and the special verdict failed to contain a finding that the plaintiff had sustained any damage from either fumes or flood, that is, if the jury had not been able to agree in making up the

special verdict that the plaintiff had sustained any damage from either fumes or flood (caused, of course, by the defendant) then under the federal rule the effect of such failure of the jury to make a finding upon such essential fact would be equivalent to the jury's finding that the plaintiff had not sustained the burden of proof in this respect and would be equal to a finding for the defendant upon this issue of fact.

If such would be the legal effect of the failure of the jury to make a finding upon an essential fact in a special verdict, it would seem to logically follow that there would be the same legal effect by the jury's failure to find an essential fact in answer to a specific interrogatory.

Applying this rule to the situation in this case, when the jury failed to answer interrogatory K (Record, Volume 1, Page 36) it was equivalent to a finding that the plaintiff had not sustained the burden of proof to establish that he had suffered any fumes damage and if the plaintiff had not sustained that burden, he would not be entitled to recover a judgment for such claimed damages.

Likewise, applying the same rule, when the jury failed to answer interrogatory L it was equivalent to a finding that the plaintiff had not sustained the burden of proof that he had suffered any damage by any acts of the defendant on account of the loss of his cottages by the flood.

If the plaintiff had not been able to sustain the burden of proof which the law placed upon him of establishing either fumes damage or flood damage caused by the defendant, he was then not entitled to any judgment and there should have been a judgment for the defendant.

If, however, the proper rule to apply in the federal courts (although there has been no adjudication which we can find) is that the failure of the jury to answer an interrogatory is a disagreement of the jury upon the fact covered by the interrogatory, then the jury in this case was not able to agree either upon the issue of fumes damage or upon the

issue of flood damage, and that disagreement necessitated a new trial, notwithstanding the jury wanted to give the plaintiff \$7908.00, as juries frequently do when the defendant is a corporation, but the giving to the plaintiff some of the defendant's money ought to be the result of the jury's agreement, because it is the constitutional right of the defendant to have the jury pass upon all of the material facts in issue by unanimous verdict, and if the jury does not do so, the defendant has been deprived of a jury trial as guaranteed by the Seventh Amendment of the Constitution.

Hodges v. Easton, 106 U.S. 408.

As it stands now, Gulf Refining Company has a judgment against it based upon a verdict as to which the jury was unable to agree upon either one of the only two elements of damage that were involved in the action.

If a constitutional jury trial means unanimous agreement of the jury to a verdict, as it surely does, then we have been deprived of the right of trial by jury guaranteed by the Seventh Amendment to the federal Constitution.

RULE 49 b

FEDERAL RULES OF CIVIL PROCEDURE

The rules of civil procedure were promulgated by this Court under the authority of the Act of Congress of June 19, 1934. 48 Stat. 1064; 28 U.S.C. Section 723 b, c, and rule 49 b provides that the Court may submit to the jury, together with appropriate forms for a general verdict written interrogatories upon one or more issues of fact, the decision of which is necessary to a verdict.

This rule further provides what shall be done if the answer to the interrogatory is harmonious with the general verdict, and what shall be done if the answers are incon-

sistent with the general verdict, but the rule does not provide what the procedure shall be if the interrogatory is not answered at all. We cannot, therefore, find the answer to our problem in the rules. Further, since there has been no adjudication by this Court or any other federal court, so far as we can find, upon the precise question of procedure where there has been a disagreement of the jury in failing to answer an interrogatory upon an issue necessary to the verdict, it seems to us that the question is of sufficient importance to justify the issuance of the writ of certiorari.

THE CIRCUIT COURT OF APPEALS' OPINION

There is published as an appendix hereto for the convenience of the Court the opinion of the Circuit Court of Appeals, from which it will be seen that the question raised upon this petition for writ of certiorari was disposed of by the Circuit Court of Appeals upon an erroneous assumption of fact. The court assumed that the general verdict was for fumes damage alone and that the jury made no findings for the plaintiff for flood damage.

Upon this erroneous assumption the Circuit Court of Appeals found that the disagreement of the jury on the flood damage was immaterial.

The petitioner filed an application for rehearing, which is also printed as a part of the appendix hereto, in which it will be seen that it was demonstrated to the Court of Appeals that their assumption that the general verdict did not include any element of flood damage was entirely erroneous.

That demonstration will not be repeated here, but we respectfully request this Court to read the application for rehearing in the Circuit Court of Appeals, from which it will appear by reference to the charge of the trial court and the issues as presented to the jury and the general verdict itself, that there could be no doubt about the fact that the

general verdict of necessity included both the fumes damage and the flood damage.

The Circuit Court of Appeals' opinion upon the application for rehearing, also printed in the appendix, states that because the jury found in answer to interrogatory G, Record, Volume 1, Page 35, that the lease had been breached from January, 1934, to August, 1938, and that the only damage which had been claimed for this entire period was the damage from the fumes, that necessarily the general verdict covered only the fumes damage.

The incorrectness of this view is perfectly apparent when the plaintiff's claim is examined as it is alleged in the second amended petition upon which the case was tried, in which the plaintiff is claiming all damages both for fumes and for flood which occurred during the period from January, 1934 to August, 1938. The record shows that for the period prior to 1934 there had been a former action for fumes by the plaintiff covering the period from the installation of the refinery to January, 1934 and the plaintiff had recovered a verdict which the defendant had paid. Then the plaintiff waited until August, 1938 and began this, his second suit, and two other suits have subsequently been filed covering subsequent periods of years, so that the period from January, 1934 to August, 1938 is only one of the periods covered by the plaintiff's claims for damage, but it is the period covered by this particular suit, and within that period the flood occurred, in January, 1937, so that in this suit, which covered the period from January, 1934 to August, 1938 there was added, to the claim for fumes damages, the additional claim for the flood damage.

So that for the Circuit Court of Appeals to say in its opinion overruling our application for rehearing that the general verdict in this case reflected only fumes damage but no flood damage because the fumes damage was the only damage claimed for the period from January, 1934 to August,

1938 is simply a misstatement of a fact that is not in dispute in the record, because within that period, that is, in January, 1937 the claimed flood damage occurred.

The original opinion of the Circuit Court of Appeals on the point involved in this petition is founded upon an erroneous assumption of fact, and its opinion overruling the application for rehearing is based upon an equally erroneous assumption of fact, because the fumes damage was not the only damage which the plaintiff claimed occurred in the period covered by this action, that is, from January, 1934 to August, 1938.

Let us assume, however, that the Circuit Court of Appeals was right in saying that the failure of the jury to answer interrogatory L as to flood damage did not affect the general verdict because the general verdict did not contain any element of flood damage. What, then, can be said about the failure of the jury to answer interrogatory K (Record, Volume 1, Page 36), which interrogatory asked the jury to determine the amount, if any, of damages for the fumes?

The jury could not agree upon the amount of fumes damage and, therefore, failed to answer interrogatory K.

If, as the Circuit Court of Appeals held, the general verdict represents only the fumes damage, how can there be a valid general verdict if the jury was not able to agree upon the amount of the fumes damage, as it was not by its failure to answer interrogatory K.

The fumes damage was to be measured by the loss of the rentals of the cottages, and let us suppose, for illustration, that the jury had found that the plaintiff had only lost about \$500.00 in rentals on account of the fumes and had, therefore, answered interrogatory K by writing in the amount of \$500.00, but in the general verdict had put in the amount of \$7908.00, certainly there would have been an inconsistency between the answer to the interrogatory and the general verdict which would have caused the general verdict to fail

and judgment would have been entered upon the answer to the interrogatory under the provisions of Rule 49 b.

This means that the defendant was entitled to test the correctness of the general verdict by having interrogatory K answered, even if the general verdict did not contain any element of flood damage under the theory of the Circuit Court of Appeals, and where Rule 49 b gave to the defendant the right to have an interrogatory submitted to test the correctness of the general verdict, the trial court should have compelled the answer to that interrogatory or declared a disagreement of the jury and should have ordered a new trial. Under the theory of the Circuit Court of Appeals the trial court had a right to disregard the provisions of Rule 49 b and take the general verdict as if it were the answer to the interrogatory, and if this procedure may be followed by the trial court, then any disagreement of the jury upon any interrogatory may be disregarded even though the answer to that interrogatory may be the acid test for determining the validity of the general verdict. If the jury in this case could not agree upon the amount of fumes damage by its failure to answer interrogatory K, then that disagreement is not cured by taking the general verdict as if it were an answer to the interrogatory, even upon the erroneous theory adopted by the Circuit Court of Appeals that the general verdict reflected only the fumes damage.

Let us test the problem in another manner. Suppose the Circuit Court of Appeals was right in assuming that the general verdict included only the fumes damage. When the jury failed to answer interrogatory K it was equivalent either to a finding that the plaintiff had not sustained the burden of proof of establishing that there was fumes damage, or that the jury disagreed upon this issue, whichever is the proper rule of interpretation to be given to the failure to answer the interrogatory. If the former is the correct rule, then the failure to answer the interrogatory is equiva-

lent to a finding that the plaintiff has not proven that he had suffered any loss of rentals by reason of the fumes caused by the defendant. The general verdict, on the other hand, found that the plaintiff had proven such loss.

There would then exist an inconsistency between the interrogatory and the general verdict and Rule 49 b would require the trial court to enter judgment according to the interrogatory, or at least to grant a new trial because of the inconsistency. If the other interpretation of the effect of the failure to answer the interrogatory is the correct one, namely, that it amounts only to a disagreement of the jury, then the failure of the jury to answer the interrogatory is equivalent to an answer, "We cannot agree," but the general verdict says, in effect, "We can agree." That situation then creates an inconsistency between the interrogatory and the general verdict which, under Rule 49 b, at least requires the trial court to grant a new trial.

It does not seem to us that the proper interpretation of Rule 49 b leaves any discretion in the trial court to disregard the provisions of the rule and to grant a judgment upon the general verdict when that is manifestly inconsistent with the meaning of the failure to answer an interrogatory, because these rules of civil procedure adopted by this Court under the authority granted by Congress have a mandatory effect upon the trial courts, otherwise the whole system of rules will break down if the federal trial courts may follow them or not, depending upon the will of the particular trial judge. This case should afford this Court an early opportunity to announce to the federal trial courts that the rules of civil procedure adopted by this Court are to be followed in the trial of cases as they are written.

We respectfully contend, therefore, that the petitioner has not had a jury trial by unanimous agreement of the jury as the Constitution requires, and that the matter of procedure where there is a disagreement of the jury upon a fact

necessary for a verdict is of sufficient importance as bearing upon jury trials in the federal court to justify the granting of this petition.

Respectfully submitted,

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